No. 12235

United States
Court of Appeals
For the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt,

Appellee.

REPLY BRIEF OF APPELLANT

JOSEPH L. HUGHES,
BENJAMIN H. KIZER,
Old National Bank Building,
Spokane, Washington.

GRAVES, KIZER & GRAVES
Of Counsel

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PREFACE

Our high regard for the skill and ability of counsel for appellee increases our great surprise at the conduct of counsel in his answering brief in so repeatedly going outside of the record of this case to recite facts that are known to him alone.

(a) On page 3, again on page 5, again on page 40, and yet again on pages 41-2, counsel is at pains to give his own unverified account of other cases parallel to the case at bar pending before two other federal judges, where, as he avers, like decisions to that of Judge Driver's, were rendered orally by Judges Black and Fee.

Neither this court nor ourselves are advised as to whether all or any of the questions here raised or all or any of the authorities here cited were presented to either of these judges. Neither this court nor ourselves can know how much was involved or how seriously counsel for creditors took their burden of defense. The fact that neither trial judge wrote an opinion and that the defendants did not see fit to appeal may be some evidence that the decisions were not intended as precedents even with the trial judges themselves.

In our many years of active practice this is the first time that we have encountered counsel who recited his version of the offhand oral opinion of trial judges on a point of substantive law, with a view of influencing the decision of an appellate court.

(b) Again, on pages 13 and 28, counsel has seen fit to quote from the debtor's petition for an arrangement in the bankruptcy proceedings in support of his position, although there is nothing in this record pertaining to that petition.

In the limited time allotted us for reply brief, we have no opportunity to verify the accuracy of the quotations, or to inquire, as seems likely, whether other allegations in the petition was called to this court's attention might be more favorable to us than the quotation cited by counsel. Furthermore, if we had the time, our standards of propriety in these matters would foreclose us from quoting such paragraphs.

(c) Somewhat less serious, because we, too, know the facts but still constituting an unwarranted excursion outside the record, is the statement of appellee on page 10 of his brief that only one of the three counsel who argued the case below stressed the point that a petition for an arrangement is not an application for a receiver. Having so recited, appellee then declares that it seems obvious that this point "has been included as a point of objection only out of deference to one of counsel whose case is controlled by this appeal." This court is familiar with the practice of associate counsel in dividing up points for argument. The fact that one of counsel argues exclusively one point and other counsel argue other points cannot be taken to impeach the sincerity of all counsel, respecting each of the points urged individually by them.

It is our view that appellee owes to this court and to appellant an apology for thus flagrantly and repeatedly travelling outside the record.

ARGUMENT

I.

Was Chemurgy's Petition for an Arrangement an Application for Appointment of a Receiver?

(a) *Significance of "the Filing of the Application."*

On this point, at page 10 of his trial brief, appellee places in the foreground that part of the trial court's opinion in which the learned trial judge has argued that it is necessary to go back to the petition for an arrangement in order to comply with Rem. Rev. Stat. of Wash., §§ 5831-4-6. By brief excerpt from that opinion of the trial judge (Op. 10) it will be seen that the court felt it necessary to search for a date of filing an application. Thus, the court says:

> "The crucial event on which the reckoning of time is based as to both limitations is the *filing* of the application for the appointment of the trustee. * * * The petition for arrangement is the only petition, or application, *ever filed* pursuant to which the appointment of the trustee is made." (Emphasis ours.)

In thus emphasizing the date of filing it is obvious that the trial judge has overlooked the decision of the Supreme Court of Washington in *Seattle Ass'n, etc. v. GMAC,* 188 Wash. 635, 639; 63 P. (2d) 359.

In that case the debtor made a common law assignment for the benefit of creditors and GMAC was sued by the assignee to recover a preference received within four months prior to the assignment. GMAC raised the point that the assignee was not appointed upon "the *filing* of * * * application."

Although presumably the common law assignment had not been filed, and an assignment for the benefit of creditors is an "application" in only the most liberal sense of the word, the Supreme Court of Washington nevertheless held that it would not regard the words in the statute "the filing of an application" as limiting the right of the assignee for the benefit of creditors to sue under this statute. From this decision it is clear that there is no occasion to place the excessive emphasis the trial judge placed upon the "crucial" need to find a date of *filing*. The real test is when the "application" went into effect.

If the able trial judge had not thus stuck in the bark over his assumed necessity of finding that an application for appointment of trustee had been "filed," he would not have felt obliged to go back to the date of filing the petition for an arrangement as the only application "ever filed." As we pointed out in our opening brief (p. 10), he would then have perceived that when Chemurgy found itself unable to consummate its proposed plan of arrangement, and so advised the court "upon a hearing duly noticed and held" (See Comp. par. 4, Tr. 2-3), this

notice and hearing of themselves constituted an application for adjudication of bankruptcy and therefore for the appointment of a trustee.

It is clear that since an unfiled assignment for the benefit of creditors constitutes an application and its date sets in motion the effect of the statute, as was held in the GMAC case, supra, then such a notice and hearing (Complaint, par. 4, Tr. 3) that Chemurgy had been compelled to abandon its proposed plan for an arrangement was likewise an application for the appointment of the trustee in bankruptcy, in this statutory sense. It is equally clear that this notice and hearing constituted the originating fact that authorized the bankruptcy court so to proceed.

(b) *Arrangement Provisions in Chapter XI.*

It would be fruitless to follow appellee in his prolonged recital of the various sections of Chapter XI (U.S.C.A., Title XI, §§ 701-799) pertaining to *arrangements,* whereby an embarrassed creditor may obtain relief. Since these sections provide for relief for bankrupts (§ 721), as well as for debtors (§ 722) who are merely temporarily embarrassed, certain of these provisions can, of course, be assimilated to like provisions where a bankrupt files a petition in bankruptcy.

But these similarities prove nothing. Our legal inquiry is a simple one. Under Rem. Rev. Stat. § 5831-4, what is the date when this debtor applied for the appointment of a "receiver"? It is manifest that it

did not intend to apply for the appointment of a receiver or trustee at that time. It was not confessing bankruptcy. It was rather seeking an arrangement to escape the necessity of bankruptcy with the consequent appointment of a trustee.

Appellee's own allegation in this complaint (Tr. 3) shows conclusively that what operated to set the bankruptcy machinery in motion was the notice and hearing in November when the debtor announced that it had failed in its plan for an arrangement. This announcement, this notice and hearing terminated the plan for an arrangement and set the wheels in motion that resulted in adjudication of bankruptcy and the appointment of appellee as trustee.

Why, then, does appellee disregard the reality, the actual transaction that operated as an application for the adjudication of and appointment of a trustee? Simply because thus to accept the actual facts would deny to appellee any shadow of right to recover.

So, there is built up by appellee this artifice, this pretense, this fiction that there lurked in the petition for an arrangement an abandonment of that petition, a petition for an adjudication of bankruptcy and for the appointment of a trustee.

Ever since the opinion of Mr. Justice Storey in *U. S. v.* 1960 *Bags of Coffee,* 8 Cranch 398, 415 (See, also, a collection of modern cases to same effect in *Union Oil Co. v. Johnson,* 137 P. (2d) 706, 708), the rule has been uniformly recognized "that legal fictions

will not be adopted unless they are consistent with all relevant facts and circumstances and do equity."

(c) *Hardship Plea.*

On pages 20-25 of appellee's brief, appellee makes an elaborate plea of hardship, if the court does not adopt its forced construction of a petition for an arrangement as, in effect, an application for the appointment of a trustee.

Appellee says that if debtors

> "* * * can thus initiate proceedings under Chapter XI and hold such proceedings before a district court for a period of four months they can, under appellant's contention, free themselves from the necessity of returning payments which they should have returned if ordinary bankruptcy proceedings had been initiated at the time Chapter XI proceedings were begun."

Nonsense!

Section 732 of Chapter XI (U.S.C.A.) specifically provides that

> "* * * the court may, upon the application of any party in interest, appoint, if necessary, a receiver of the property of the debtor."

Thus, if any creditor of the debtor who files such a petition for an arrangement believes that it will result in the failure to recover preferential payments he has only to make such a showing to the court, have a receiver appointed and that receiver can at once bring suit to recover these preferences.

Precisely the same plea of hardship under such circumstances was offered to the Supreme Court of Washington in *Peeples v. Hayes,* 4 Wash. (2d) 253; 104 P. (2d) 305, and was there decisively rejected by that court which was at pains to point out similar remedies for the creditors, and thereupon strictly applied the statute as we have contended.

In view of the plain remedy in the hands of any creditor we must admire the courage with which counsel asserts a hardship, whose non-existence is so manifest.

This court is doubtless well aware of the course of events that so often occur when a debtor that is not bankrupt in the federal sense, but is temporarily embarrassed for want of ready cash to meet current bills, is struggling to keep going. His principal creditors may share his hope that the debtor can work his way out of his difficulties. So, they stand by, refraining from moving in on the debtor, for month after month. Each month that the creditors wait cuts off from their recovery an earlier month of payments made in due course to various of the creditors of the debtor.

Whether a petition for an arrangement is filed or not, this period of grace to enable a debtor to work his way out of his difficulties always results in failure to recover certain payments made at an earlier date.

How long this period of grace shall run depends on the creditors. That state statute we are here con-

sidering puts the creditors strictly on notice. They cannot let time run out without taking action, and then, six months later when the gamble of survival has run against the debtor, go back to a period of twelve months or more and make recovery of payments as preferential when the statute says they must act within six months.

The whole endeavor of appellee in the case is just to have it both ways. The creditors whom he represents stood by for six months without taking action, doubtless because they, like the debtor, hoped for an arrangement that would enable it to work its way out. And having thus stood by, they have lost their right to go back to that earlier period.

II.

Was the Petition for an Arrangement an Application for Appointment of Appellee, and Pursuant to which he was Appointed Within the Meaning of Rem. Rev. Stat. § 5831-4-6?

(a) *Meaning of Limiting Phrases.*

The admiration which appellee expresses on page 3 of his brief for Judge Driver's sure experience in bankruptcy matters, so long as that jurist holds with him, quickly dissolved in criticism on two other contentions of appellee, which Judge Driver found to be without merit. On pages 32 to 40 of appellee's brief he argues that Judge Driver is mistaken in

his interpretation of the two underscored phrases in the language of Rem. Rev. Stat., § 5831-5 which follows: "*If not otherwise limited by law,* actions *in the court of this state* by a receiver to recover preferences may be commenced at any time within but not after six months from the date of the application for the appointment of such receiver."

So that this court may have conveniently before it Judge Driver's decisions on these two points so criticised by appellee we quote from his opinion (Tr. 10) the following:

> "The plaintiff earnestly urges that the State statute is not applicable because of the following language (italicised for emphasis) of Section 3, namely: *'If not otherwise limited by law,'* an action may be brought by a trustee *'in the courts of this state'* to recover a preference within but not after six months from the filing of the petition for the appointment of the trustee. The argument is that the action is 'otherwise limited' by the general two-year limitation in Section 11e of the Bankruptcy Act (11 U.S.C.A., 1947 pocket part, Sec. 29e) and, furthermore, that the six months' limitation in the State Act, by its terms, is restricted to State court actions and is wholly inoperative in actions prosecuted in the Federal Courts. I do not so construe the State Act. I think that the words, 'unless otherwise limited by law,' apply only to the affirmative grant of the right to bring the action within the specified time and should not be considered, as plaintiff's argument implies, to mean 'unless otherwise *extended* by law.' The statute says that an action to recover a preference *may* be brought in six months, but the phrase under consideration makes

it clear that the grant is not an absolute one and will not sustain an action barred by some other applicable law. It may have been included in Section 2 in order to avoid all possibility of conflict with the provision of Section 3 (Rem. Rev. Stat. 5831-6) limiting recovery of preferences to transactions which occurred within four months prior to the application for appointment of the receiver or trustee. The language of Section 2 makes it clear that if the action is barred by Section 3, the affirmative grant in Section 2 will not revive it.

"Moreover, I think the language in Section 2 'in the courts of this State,' should not be construed as a legislative declaration that if the action to set aside a preference is brought in a Federal Court, or in a court of a foreign state, the six months' limitation does not apply. The statute is a further modification of the trust fund doctrine, a long-standing Washington rule that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors and that transaction, which prefer one creditor over another, are voidable. The Washington Supreme Court had described the doctrine as 'our court made rule.' It was a natural thing for the Legislature, in restricting it, to use the expression, 'in the courts of this State.' The six months' limitation in Section 2, since it is an integral part of the statute granting the right of action, by a generally accepted rule, is not an ordinary limitation of the remedy, but a limitation of the right, which must be accepted and applied by the courts of any other state where an action to enforce the right may be brought. (See Restatement, Conflict of Laws, Sec. 605; 15 C.J.S., Conflict of Laws, Sec. 22e.) It would, indeed, be a violent assumption that the Legislature, by the mere use of the phrase, 'in the courts of this State,' intended to set aside the well known rule

> and make its express, special limitation of the right of action, which it had created, operative only in the courts of Washington and not in any other courts."

With considerable unction, appellee quotes the well-established rule that in making material changes in the language of a statute, the legislature cannot be assumed to have regarded such changes as without significance.

Granted at once, without question.

But it is appellee himself, not appellant, who distorts the phrase "if not otherwise limited by law," to fit his personal need in this case. The court will note that this section of the quoted statute is expressed in terms of grant of power to sue, "if not otherwise limited by law." To say, as appellee does, that this *limitation* on the right to sue is, as to him, a grant of *extra time* to sue, simply doesn't make sense. The word "limitation" as here used is manifestly not confined to limitations of time. Since the opening phrase of the statute is so unequivocally a limitation, it is inconceivable that any court would distort these words to mean "unless the time in which to sue is *extended* by a federal statute," which is just what appellee, in fact, contends.

Most unplausibly appellee also contends that the underscored phrase in the statute quoted above, "the courts of this State" were meant to open the door for the federal courts of this state to disregard this

limitation of time in which to sue. But remembering that the legislature was dealing with the trust fund doctrine, especially developed by the "courts of this State," it was but natural that the legislature, in altering this State doctrine, should point its remedy to the "courts of this State." Since § 5831-5 of Rem. Rev. Stat. is phrased in terms of a grant of power to sue, it could more plausibly be argued that the legislature intended all suits under this statute to be prosecuted only "in the courts of this state."

Be that as it may, it is simply absurd to read into this innocent phrase a deliberate grant of power by the legislature of this state to other state courts and the federal courts to do what the Washington state courts are prevented from doing. The jealousy of all state legislatures of federal power makes it plain that this was farthest from the mind of the draftsmen of this state or of the legislature that adopted it.

The argument of appellee on these two points, though much elaborated, calls for no further analysis.

(b) *Was Appointment of Appellee Made "Pursuant to" Petition for Arrangement?*

On page 4 of appellant's opening brief, for purposes of clarity appellant divided his argument on his objection number one (Tr. 26) into two parts. Both parts arise out of the phrase in that objection "the appointment of a receiver within the meaning of Remington's Revised Statutes § 5831-4." That section of Remington's Revised Statutes prescribed, as

we there pointed out, that the date of application refers to (a) "the application for the appointment of a receiver, (b) pursuant to which application such appointment is made." In cutting that phrase in two and considering, (a) the application for the appointment of the receiver and, (b), the phrase "pursuant to which application such appointment is made" we have presented the matter precisely and exactly within the limits of the objection.

As to this second half of our objection, appellee contends himself with declaring dogmatically (Br. 28) that

> "* * * the point is made without merit and was not even made a basis of objection at the time the District Court entered his findings and conclusions as required by Rule of Civil Procedure 46." (See Tr. 26.)

The main strength of the point (b) lies in the fact that it once more discloses the complete artificiality of the court's conclusion that he must go back to a petition for arrangement to find the date of filing of an application for the appointment of the trustee. Assuredly no one can assert that the debtor intended to apply for a receiver and the words "pursuant to" in the statute makes it clear that intent is of the essence of the statutory requirement.

III.

Does 11 U.S.C.A. § 29 (e) Destroy the Effect of Rem. Rev. Stat. § 5831-5?

(a) *Effect of* 11 *U.S.C.A.* § 791.

On page 31 of appellee's brief, appellee quotes in full § 791 (11 U.S.C.A.) which suspends certain statutes of limitation "while a proceeding under this chapter [XI] is pending and until it is finally dismissed." From this section counsel draws the inference that to urge, "as appellant in support of this point must urge" that an action should have been brought during the pendency of the arrangement procedings to recover this preference is unreasonable.

In his eagerness to make this point appellee seems to overlook the fact that the only statutes of limitation so suspended by this bankruptcy statute are those affecting claims provable *under this chapter* and the running of all periods of time prescribed *by this act*. In other words, Congress was scrupulous to see that only federal statutes were so suspended.

This limitation of the suspension at once gives rise to the questions: Why did Congress only suspend federal statutes? Why did it not omit the words "under this chapter" and "prescribed by this act" so that the suspension would apply generally? This strict limitation of the suspension to federal statutes is significant of an intent *not* to use the "arrangement" Chapter (XI) to suspend the running of time pre-

scribed by any state statute. In other words, the exact opposite of what counsel contends is reasonable. The statute manifestly contemplates that if recoveries of this character are to be sought, action should be brought during the pendence of the petition for an arrangement.

(b) *Analysis of Appellee's Authorities.*

On this point appellee's main reliance is *Herget v. Central National Bank & Trust Company,* 324 U. S. 4, which pleases appellee so much that he cites it six times under this heading and prints his favorite quotation from it twice, once on page 44 and again on page 45. Such a paragraph wrenched out of its context may seem to have a surface pertinence. But in fact the Herget case does not touch the case at bar at any point. In the Herget case the court affirmed only that U.S.C.A. § 29 (e)

> "* * * bars after two years from the date of adjudication in bankruptcy an action brought by the trustee in bankruptcy to set aside and recover a preferential transfer; and a state statute of limitations cannot operate to extend the period." (Syllabus)

This is the negative side of 29 (e). Obviously Congress intended the bankruptcy trustee to act promptly and it thus limited his power to sue.

But to point out when a trustee cannot sue throws no light on the times when or the circumstances under which he can sue. Granting, for the sake of this argument, that 29 (e) so suspends the ordinary state

statutes of limitation, the question still remains: Does 29 (e) strike out of state statutes such as Rem. Rev. Stat. § 5831-5 a provision which is made a condition of the right to sue and which is not normally regarded as a statute of limitations at all? There is nothing in the language of 29 (e) that in any way indicates an intent to go beyond the ordinary statute.

Equally, there is nothing in the Herget decision, or in the reasoning of the court in that decision, to indicate that this problem was before the court, or that it intended its generalization to apply to such a case as we have here. To lay such extraordinary emphasis on the Herget case is simply to expose appellee's unhappy consciousness of his want of authority for his position.

It is appropriate here to emphasize again the wide difference between ordinary statutes of limitation, dealt with by 29 (e), and the Washington statute, Rem. Rev. Stat. § 5831-5-6. In *Peeples v. Hayes,* 4 Wash. (2d) 253, 257, 104 P. (2d) 305, the Washington Supreme Court, following and re-affirming its earlier decision in *Morris v. Orcas Lime Company,* 185 Wash. 126; 53 P. (2d) 605, defines the basic difference between these ordinary statutes and the statute here under consideration in these words:

> "The fact that statutes of limitation, properly so-called, are statutes of repose * * * at once suggests that 5831-1 was not intended to operate as a statute of limitation in the sense that the word 'limitation' is used in Chapter III, Title 2

Rem. Rev. Stat." (The chapter in which all the various Washington limitations of action are collected.)

The Washington Supreme Court following the Orcas Lime and Peeples cases in *Eagles v. General Electric Company,* 5 Wash. (2d) 20, 23, 104 P. (2d) 912, puts the distinction concisely in saying that § 5831-1 "is not in a true sense a statute of limitations at all." This court repeated this characterization in *Lane v. Dept.,* 21 Wash. (2d) 420, 425; 151 P. (2d) 440 (1944). See, also, to the same effect, *Earle v. Froedtert,* 197 Wash. 341; 85 P. (2d) 264.

Appellee then proceeds to quote elaborately from *In re Handy-Andy Stores,* 51 F. (2d) 98, and to cite also in support of it *Isaacs v. Neece,* 75 F. (2d) 566. These two cases are simply one side of an old controversy between the Fifth Circuit and the Ninth Circuit in which the Fifth Circuit criticised the Ninth Circuit's holding in *Davis v. Willey,* 273 F. 397, and *Meikle v. Drain,* 69 F. (2d) 290, declaring in *Isaacs v. Neece,* supra, that the view of the Fifth Circuit "furnishes a more reasonable, and more workable theory of limitation than the one advanced in the Davis and Drain cases, supra.

That controversy antedating the enactment of § 29 (e) does not aid in the solution of our problem.

Yet the skeleton of this earlier difference between the two Circuits came to the fore in *Sproul v. Gambone,* 34 F. Supp. 441, on which Judge Driver places

his sole reliance—and justly so, for there is no other case that touches the problem in favor of appellee.

Sproul v. Gambone cites the Handy-Andy and Isaacs v. Neece cases, and no others, as the warrant for its decision. Furthermore, in so doing, it treats the Pennsylvania bulk sales statute's provisions as an ordinary statute of limitation and quite ignores the distinction between the ordinary statute of limitations, which goes to the remedy, and a statute that conditions and limits the right, itself, which is so carefully recognized and applies in *In re Appalachian Publishers,* 29 F. Supp. 1021.

In *McBride v. Farrington,* 60 F. Supp. 92, there is also nothing that throws any light on our specific problem, although there are general remarks that would be interesting as dicta if we were concerned with the ordinary statute of limitation. However, one remark of Judge Fee, dealing with the history of the Act, is of interest when he declares that 29 (e) "was obviously a compromise."

A part of that compromise is expressed in the last half of § 29 (e), which we quote, omitting inapplicable words:

> "* * * where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable State law, for taking any action, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the

> bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of adjudication."

This part of § 29 (e) shows a manifest inclination to have scrupulous regard to state law that is quite inconsistent with the ruthless sweep claimed by appellee for 29 (e).

Under this section, read as a whole, the most that could be urged by appellee, it seems to us, is that where, as a condition to his right to bring suit he was obliged to take action within six months, he might claim that he had sixty days after the adjudication within which to take the action of bringing the suit required by such state statute.

But even this safeguard in the Act does not protect him; for the adjudication took place on December 13, 1947, he was appointed trustee on January 6, 1948, and he did not bring this suit until May 28, 1948.

CONCLUSION

IV.

In closing this reply brief we cannot refrain from again commenting on the outrageous perversion of the meaning and purpose of Rem. Rev. Stat., § 5831-4-6 if appellee's position were to be sustained by this court.

The Bankruptcy Act itself in 11 U.S.C.A. § 96, elaborately defines preferences in bankruptcy. All the remedies of this section were open to appellee. If any of these alleged preferences come within the bankruptcy definition of preferences, appellee had and still has the right under this federal statute to sue for and recover them.

But, believing that this state statute is more advantageous, he prefers to shelter under that Act and to sue for recovery of alleged preferences by means of its terms. Yet he repudiates a part of the statute that the legislature has woven into the very warp and woof of the statute, and thus gives it an effect never intended by the legislature.

No language in 29 (e) authorizes such a suit; for, at the most, that section deals only with ordinary statutes of limitation.

But appellee goes farther than this. He insists also that he may go back six months to the filing of a petition for an arrangement and arbitrarily give to it the effect of an application for appointment of the trustee, when manifestly that must have been the farthest from the intent or the purpose of the debtor.

It will indicate an appropriate respect for state

statutes, it will be just, it will deal in the realities of intent and purpose to reverse the decision of the trial court.

Respectfully submitted,

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POSTSCRIPT

We have stopped the binding of these briefs after they were fully printed in order to attach this postscript calling to the attention of the court an important case extending the doctrine of *Erie R. Co. v. Tompkins,* 304 U. S. 64, and *Guaranty Trust Co. v. York,* 326 U. S. 99, to a degree that makes it directly applicable to the case at bar. This late decision of the Supreme Court of the United States, *Ragan v. Merchants Transfer & Warehouse Co.,* found in L. Ed. Advance Opinions, U. S. Supreme Court, Volume 93, No. 17, at page 1248, decided on June 20, 1949, reached the desk of the writer of this opinion only on this 10th day of August, 1949.

While this was a case founded on diversity of citizenship, the issue arose, as it does in the case at bar, as to what extent the limitations contained in a state statute will be applied when a federal court is called on to enforce a right found only in local law. Speaking to this point the court says (p. 1250):

> "* * * Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court. See Cities Serv. Oil Co. v. Dunlap, 308 US 208, 84 L. ed. 196, 60 S. Ct. 201; Palmer v. Hoffman, 318 US 109, 117, 87 L. ed. 645, 651, 63 S. Ct. 477, 144 ALR 719. It accrues and comes to an end when local law so declares. West v. American Teleph. & Teleg. Co., 311 US 223, 85 L. ed. 139, 61 S. Ct. 179, 132 ALR 956; Guaranty Trust Co. v. York, 326 US 99, 89 L. ed. 2079, 65 S. Ct. 1464, 160 ALR 1231, supra. Where local

law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other, and the principle of *Erie R. Co. v. Tompkins* is transgressed.

"We draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. We may not do that consistently with Erie R. Co. v. Tompkins."

This case strikes a heavy and telling blow against the effort of the appellee to distort a local statute under which he has brought suit in order to give it a significance never intended by the lawmakers who enacted it.